

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

ROQUE MENDOZA ZAMUDIO,	)	No. CV-F-05-899 REC
	)	(No. CR-F-99-5039 REC)
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	PETITION FOR REDUCTION IN
vs.	)	TERM OF IMPRISONMENT
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	
_____	)	

On July 12, 2005, petitioner Roque Mendoza Zamudio filed a "Petition for Reduction of Term of Imprisonment", contending that he is entitled to a reduction of his sentence because of the Supreme Court's decisions in United States v. Booker, \_\_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005), Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000).

Petitioner brings this motion pursuant to 18 U.S.C. § 3582(c)(2) and/or 28 U.S.C. § 2241.

Petitioner pleaded guilty pursuant to a written plea

1 agreement to conspiracy to manufacture, distribute and possess  
2 methamphetamine with intent to distribute. The plea agreement  
3 provided in pertinent part:

4           2. Agreements by the Defendant.

5           ...

6           (d) The defendant waives his right to  
7 challenge his sentence or the manner in which  
8 it was determined in any post-conviction  
9 attack, including but not limited to a motion  
10 brought under Title 28, United States Code,  
11 Sections 2241 or 2255.

12           ...

13           4. Nature, Elements, Possible Defenses, and  
14 Factual Basis.

15           ...

16           (c) The defendant will plead guilty because  
17 he is in fact guilty of the crime set forth  
18 in Count One of the Indictment. The  
19 defendant also agrees that the following are  
20 the facts of this case, although he  
21 acknowledges that, as to other facts, the  
22 parties may disagree (the defendant  
23 specifically denies involvement in the  
24 manufacturing activities at 46512 BaldPate,  
25 Squaw Valley, California):

26           Beginning at a time unknown but  
between January, 1998 and  
continuing to February 13, 1999, in  
Fresno County and elsewhere, State  
and Eastern District of California,  
the defendant knowingly and  
intentionally entered into an  
agreement with other individuals to  
manufacture methamphetamine. The  
defendant further agrees that this  
conspiracy involved more than 500  
grams of a mixture containing  
methamphetamine (or 50 grams of  
actual methamphetamine).

Specifically, the defendant leased

1 the property located at 10389 E.  
2 Shaw Avenue, Clovis, California,  
3 intending to use it to make  
4 methamphetamine.

5 The defendant and other individuals  
6 did manufacture methamphetamine at  
7 this location.

8 Approximately 169 grams of actual  
9 methamphetamine was found at this  
10 location on February 13, 1999. In  
11 addition, one 22-liter vessel  
12 (capable of manufacturing  
13 approximately 7-8 pounds of  
14 methamphetamine was found at that  
15 residence. Another 22-liter vessel  
16 was found in the garage of the  
17 defendant's residence.

18 The defendant and government do not  
19 agree as to whether the  
20 manufacturing activities at the  
21 Squaw Valley location were part of  
22 this conspiracy or should be  
23 treated as relevant conduct in  
24 computing the defendant's offense  
25 level.

26 5. Potential Sentence.

The defendant understands that since the  
offense to which he is pleading guilty  
occurred after November 1, 1987, a sentencing  
guideline range for this case will be  
determined by the Court pursuant to the  
Sentencing Reform Act of 1984 ... The  
defendant further understands that the Court  
will impose a sentence within that guideline  
range, unless the Court finds that there is a  
basis for departure (either above or below  
the range) because there exists an  
aggravating or mitigating circumstance of a  
kind, or to a degree, not adequately taken  
into consideration by the Sentencing  
Commission in formulating the guidelines.  
The following is the maximum potential  
sentence which the defendant faces:

(a) Imprisonment.

Mandatory Minimum: 10  
years

Maximum: life

Petitioner was sentenced on June 17, 2000 to 135 in custody.

Petitioner did not file an appeal.

Petitioner is not entitled to relief sought by his motion pursuant to Section 3582(c)(2). Petitioner's motion is based on rulings by the United States Supreme Court, not on a "sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o) as required by Section 3582(c)(2). See e.g., United States v. Gudino-Martinez, 2005 WL 1126840 (E.D.Wash. 2005).

Petitioner cannot proceed in this court pursuant to 28 U.S.C. § 2241. Petitioner contends that

Section 2255's 'Saving Clause' is applicable here sub judice where Movant did not file a timely Section 2255 Motion. 'Where Section 2255 is inadequate or ineffective to address the issues raised, the "Saving Clause" was incorporated into 2255's stricter conditions under the AEDPA' to allow a challenge to the sentence length under § 2241.

Here, however, petitioner waived his right to challenge his sentence pursuant to Section 2241. Petitioner makes no claim that the waiver in the plea agreement was not knowing and voluntary. Therefore, he cannot rely on Section 2241 to obtain the relief sought by this motion.

Petitioner contends that he was denied the effective assistance of counsel because of counsel's failure to file an appeal on the ground that the court enhanced petitioner's

1 sentencing guideline range under the preponderance of the  
2 evidence standard. In so arguing, petitioner relies on In re  
3 Winship, 397 U.S. 358 (1970) and Sullivan v. Louisiana, 508 U.S.  
4 275 (1972), contending that these decisions by the Supreme Court  
5 made the court's enhancement of his sentence and the Sentencing  
6 Guidelines unconstitutional even before Apprendi, Blakely, and  
7 Booker.

8 Because a claim of ineffective assistance of counsel cannot  
9 be waived by a plea agreement, see United States v. Pruitt, 32  
10 F.3d 431, 433 (9<sup>th</sup> Cir. 1994), the court examines petitioner's  
11 claim.

12 As noted, petitioner seeks to proceed pursuant to 28 U.S.C.  
13 § 2241 rather than Section 2255. Petitioner undoubtedly seeks to  
14 do so because his claim of ineffective assistance of counsel  
15 based on counsel's failure to appeal is barred by the one-year  
16 limitation period set forth in 28 U.S.C. § 2255 and petitioner  
17 cannot demonstrate that he is entitled to equitable tolling of  
18 the limitation period. However, petitioner's remedy under  
19 Section 2255 is not rendered inadequate or ineffective merely  
20 because it is barred by the one-year limitation period. See  
21 Moore v. Reno, 185 F.3d 1054 (9<sup>th</sup> Cir. 1999), cert. denied, 528  
22 U.S. 1178 (2000).

23 ACCORDINGLY:

24 1. Petitioner's Petition for Reduction of Term of  
25 Imprisonment is denied.

26 2. The Clerk of the Court is directed to enter judgment for

respondent.IT IS SO ORDERED.

668554Dated: July 13, 2005

/s/ Robert E. Coyle  
UNITED STATES DISTRICT JUDGE